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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

NO. 656

In re: Attachment for Contempt of DAVID W. MACK, ROBERT PURDY, DON BINDYKE, WILLIAM BLOCK, JAMES G. KLINGENSMITH, VINCE JOHNSON and ANDREW BERNHARD, Petitioners.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### OBJECTIONS TO JURISDICTION

The petition for a writ of certiorari to the Supreme Court of Pennsylvania does not present a substantial federal question. On the contrary, the decision of the Supreme Court of Pennsylvania rests on an adequate non-federal basis. It holds that the rule of court adopted by the Court of Common Pleas of Westmoreland County, insofar as it is applicable to the facts of this case, is reasonable, and is not an abuse of the court's discretion.

The petitioners, who were found guilty of contempt of court because they intentionally violated the rule of court prohibiting the taking of photographs at certain

times and in certain places in the Westmoreland County court house, contend that a substantial federal question is involved because the Westmoreland County rule of court is in contravention of the Fourteenth Amendment to the Constitution of the United States. They contend that the right of news photographers to take pictures is a constituent element of freedom of the press, and that a rule of court limiting the taking of pictures by news photographers violates their constitutional rights.

The decision of the Supreme Court of Pennsylvania does not decide whether or not freedom of the press, as guaranteed by the United States Constitution, is involved. After pointing out (Appendix page 4) that "Freedom of the press is not a right of the press. It is a right of the people.", the court went on to state as follows (Appendix page 5):

> "Therefore, whether or not freedom of the press is here involved is immaterial, since such freedom is subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice."

Two sections of the Westmoreland County rule, sections (b) and (c), are not involved in this case, and the decision of the Supreme Court of Pennsylvania does not concern itself with those sections. The effect of the decision is distinctly limited by the language of the court to hold that (1) the portions of the Westmoreland County Rule of Court which were intentionally violated by the petitioners are reasonable regulations for the maintenance of the dignity of the court and the orderly administration of justice, and (2) the court has the

right to punish for contempt those who violated the rule of court.

The decision of the Supreme Court of Pennsylvania does not decide any federal question, but is predicated upon the inherent power of a constitutional court, created under the Constitution of the Commonwealth of Pennsylvania, to punish for contempt by virtue of its inherent power to preserve order in judicial proceedings, to enforce the administration of justice, and to make its own reasonable rules for these purposes.

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## QUESTION PRESENTED

It is the contention of respondents that the following is the only question before the court in this case:

> **Does a State Court Have the Power to Adopt a Rule of Court Making Reasonable Regulations as to the Time and Place for the Taking of Photographs by News Photographers and Other Persons in the Courthouse, and the Power to Punish, by Attachment for Contempt, Those Who Violate Such a Rule of Court?**

The questions presented in the petition for writ of certiorari were not, as stated by petitioners, decided by the Supreme Court of Pennsylvania, and are not now before this court.

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## STATEMENT OF THE CASE

On May 12, 1954, the Court of Common Pleas of Westmoreland County adopted the following rule of court, known as Rule 6084:

"(a) No pictures or photographs shall be taken, immediately preceding or during sessions of this court or recesses between sessions, in any of the court rooms or at any place in the court house within forty feet of the entrance to any court room.

"(b) No court proceeding shall be broadcast or televised.

"(c) No pictures or photographs of any party to a civil or criminal action, juror or witness, shall be taken in the Law Library or in any office or other room of the court house, except with the knowledge and consent of the person or persons photographed.

"(d) No prisoner or inmate of the county jail shall be photographed in the jail or on his way to or from a session of court."

On December 28, 1954, John Wesley Wable, who had been convicted of murder and who was confined in the Westmoreland County jail, had been called for sentence before Judge Edward G. Bauer, in courtroom number five on the fourth floor of the courthouse. The prisoner was escorted from the jail to the courtroom by Howard Bud Thomas, Sheriff of Westmoreland County, and some of his deputies. He was brought from the county jail through the Bridge of Sighs to the first floor of the courthouse, and was taken by elevator to the fourth floor.

By pre-arrangement among all of the defendants a plan was set in motion to take pictures of Wable. An unidentified man took a position at a point between the first floor and second floor of the courthouse from which he signaled to the defendant, Vince Johnson, stationed on the fourth floor, that the prisoner was being taken from the first floor to the fourth floor by elevator. Johnson then signaled the defendant, Don Bindyke, who was stationed at a point in the fourth floor corridor near the entrance to the courtroom.

A large number of people, including officers of the court and spectators, had assembled in the fourth floor corridor adjacent to the courtroom. The courtroom was crowded, and a number of State Police, deputies and constables stood guard in the aisles and the three doors of the courtroom. The courthouse elevators are at the southwest end of the fourth floor corridor, and Judge Bauer's courtroom is at the north end of the corridor. As the prisoner was being escorted from the elevator to the courtroom, Bindyke, using a small concealed camera, took two pictures of Wable and some of the sheriff's deputies just before the prisoner entered the courtroom. These pictures were taken without seeking or obtaining permission from either Wable or the sheriff's deputies.

Bindyke later took a third picture on the first floor of the courthouse near the Bridge of Sighs. This picture was also taken without the permission of Wable or the deputies.

The defendant, Robert Purdy, a free lance photographer employed by the defendant, David W. Mack, took five or six exposures of Wable without asking or receiving permission from either Wable or the sheriff's

deputies, who also appeared in the pictures. These pictures were taken with a small camera concealed under Purdy's coat. Some of the pictures taken by Bindyke and Purdy were published in the Greensburg Tribune-Review and in the Pittsburgh Post-Gazette.

On January 4, 1955, the court issued an order for the attachment of all the defendants in contempt. After a hearing on April 12, 1955 before the court en banc, all of the petitioners were found guilty of direct criminal contempt. The petitioners, Mack, Block and Bernhard were sentenced to pay costs and a fine of five hundred dollars each, and to five days' imprisonment. The petitioners, Purdy, Johnson, Klingensmith and Bindyke were sentenced to pay costs and a fine of one hundred dollars each and to five days' imprisonment.

After the dismissal of a motion in arrest of judgment, petitioners appealed to the Supreme Court of Pennsylvania, which affirmed the convictions but modified the sentences by eliminating the imprisonment of the petitioners. The petition for a writ of certiorari followed.

## ARGUMENT

### Reasons for Denying the Writ

Petitioners have endeavored to inject a constitutional question into this case by contending that since the pictures which were taken in violation of the rule were taken with small, infra-red, noiseless cameras without flash bulbs, there was no disturbance, and therefore the photographers had a constitutional right —"freedom of the press"—to take the pictures. The fallacy of this argument is manifest. A change in the type of photographic equipment cannot produce a constitutionally protected right to take pictures which did not exist previously, and which is not possessed by those who use standard photographic equipment.

Before petitioners have any rights in this court, they must show (1) that news photographers have a constitutional right to take pictures without limitation or restriction, and (2) that the decision of the Supreme Court of Pennsylvania was decisive of a federal question.

Petitioners do not argue that they have a constitutional right to use standard flash cameras, or that a rule restricting the taking of pictures with such standard equipment would be unconstitutional. They argue only that since modern, unobtrusive, noiseless cameras were used, the rule is unconstitutional as to the taking of pictures with such modern equipment. Obviously the fact that some photographers and some newspapers possess improved photographic equipment, which is apt to create less disturbance than the cameras used by other photographers and other newspapers, does not and

should not give the petitioners special or superior rights and privileges over those who do not possess the more modern photographic equipment. The purchase of an infra-red camera, which does not require the use of flash bulbs, does not thereby vest in the purchaser a constitutional right to take pictures which he did not theretofore possess.

The following statement appears in the opinion of the Supreme Court of Pennsylvania, (Appendix page 5):

> "The defendants repeatedly assert that they do not contend for the right to take pictures within the court room, even by the infra red ray method which is accompanied by no display or disorder. But it must be conceded that if we sustain their contention that this rule of court infringes upon their rights of freedom of the press, the court likewise would have no power to forbid the taking of pictures in the court room which were accompanied by no disorder or disturbance. Yet this Court has adopted Rule 223 of the Pennsylvania Rules of Civil Procedure, which has the effect of a statute, and which provides: 'During the trial of actions the court shall prohibit the taking of photographs and motion pictures in the court room and the transmission of communications by telegraph, telephone, or radio in or from the court room.'"

As was pointed out by Mr. Justice Bell in his "Opinion Concurring in Part and Dissenting in Part", (Appendix page 15):

> "Appellants have not only overlooked the authorities hereinabove cited and quoted, but have likewise overlooked a very important analogous authority

which cuts out from under them the ground upon which they build their basic contention of absolute Freedom of the Press. The Supreme Court of the United States has promulgated the following Rule of Court, viz., Rule 53 of the Federal Rules of Criminal Procedure, Title 18, U.S.C.A.: 'The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.' "

Rule 54 of the Federal Rules of Criminal Procedure makes the above quoted rule, inter alia, applicable to "all criminal proceedings in the United States district courts, which include the District Court for the Territory of Alaska and the District Court of the Virgin Islands; in the United States courts of appeals; and in the Supreme Court of the United States." As Justice Bell further stated, on the same page, if the taking of photographs of court proceedings were privileged by the First Amendment, "it is unthinkable that the Supreme Court of the United States would have adopted or would maintain its above quoted Rule of Court."

The same question which is involved in this case—the right of a court to make rules to preserve the orderly administration of justice, and to punish for contempt those who violate such rules—was before this court in the case of *Louis Clifford, Sam Giaimo and James Thomas, petitioners, v. The State of Ohio,* 349 U.S. 929, 99 L. Ed. 1259, 75 S. Ct. 771. That case arose out of the taking of photographs, by newspaper photographers, in a courtroom during the arraignment of a prisoner, and in violation of an order of court. After a hearing on a

charge of contempt against the photographer who took the picture and the city editor and reporter who had directed him to do so, all three were found guilty of contempt. On appeal to the Supreme Court of Ohio (162 Ohio 370, 123 N. E. 2d., 8) the conviction was sustained, and the Supreme Court of the United States denied a certiorari to the Supreme Court of Ohio.

As pointed out in the opinion of the Supreme Court of Pennsylvania in this case, (Appendix page 6):

> "The fact that the contempt in this case did not occur in the court room, but in the precincts of the court, does not make the rule unreasonable. '. . . the Court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court': Ex Parte Savin, 131 U.S. 280. As stated in Ex Parte Sturm, 136 A. 312 (Md): 'It is essential to the integrity and independence of judicial tribunals that they should have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure.' "

The right of courts to punish for contempt in order to preserve order in judicial proceedings and in order to maintain the dignity of the court is not open to question. See *Clifford, et al. v. The State of Ohio, supra; Fisher v. Pace,* 336 U.S. 155, 159, 93 L. Ed. 569, 573; *Ex Parte Terry,* 128 U.S. 289, 32 L. Ed. 405, 408; *Eilenbecker, et al. v. The District Court of Plymouth County, Iowa,* 134 U.S. 31, 33 L. Ed. 801; *Ex Parte Sturm, et al.,* 51 A.L.R. 356.

Perhaps the most frequently cited authority for this proposition is *Ex Parte Savin,* 131 U.S. 267, 33 L. Ed. 150. In that case, the defendant attempted, within a few feet of the courtroom, to deter a witness from testifying in a criminal case. A conviction for contempt was sustained by the Supreme Court of the United States, and at 33 L. Ed. 153, the court made the following statement:

"We are of the opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed, upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form (Ex parte Terry, 128 U.S. 289, 309) (32: 405-410); whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court. If, while Flores was in the court room

waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the Government, or had there offered him money not to testify against Goujon, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway, just outside the court room, or in the witness room, where Flores was waiting, in obedience to the subpena served upon him, or pursuant to the order of court, to be called into the court room as a witness, must it be said that such misbehavior was not in the presence of the court? Clearly not."

There is ample authority in Pennsylvania for the proposition that courts have the inherent power to punish for contempt. In *Levine Contempt Case,* 372 Pa. 612, at page 618, the Supreme Court of Pennsylvania, in an opinion written by Mr. Chief Justice Horace Stern, made the following statement:

"Generally speaking, one is guilty of contempt when his conduct tends to bring the authority and administration of the law into disrespect. The right to punish for such contempt is inherent in all courts. When it is committed in its presence the court may, in punishing the offender, act of its own knowledge without further process, proof, or examination. Such power, 'although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions.' Ex Parte Terry, 128 U.S. 289, 313. It is a

power 'essential to preserve their authority and to prevent the administration of justice from falling into disrepute.' Fisher v. Pace, 336 U.S. 155, 159. The Act of June 16, 1836, P.L. 784, section 23, 17 P.S. section 2041, recognizes 'The power of the several courts of this Commonwealth * * * to inflict summary punishments for contempts of court' in cases, inter alia, of 'the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.' "

In *Greason v. Cumberland Railway Company,* 54 Superior Ct. 595, the Superior Court of Pennsylvania affirmed an order adjudging one Thomas M. Derr guilty of contempt for attempting to influence a juror while riding with him in an automobile as the juror returned to his home for the night. At page 598, the court made the following statement:

"It has been universally recognized that the power to punish for contempt is inherent in the courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders, and writs of the court, and consequently, to the due administration of justice. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law: 7 Cyc., p. 30."

Petitioners contend that the Westmoreland County rule is unreasonable, yet, as stated in the opinion of the Supreme Court of Pennsylvania, (Appendix page 2):

"Many federal courts have adopted similar regulations. See Vol. 37, Journal of the American Judicature Society, February 1955. Among these

are Colorado, Rule 11; District of Columbia, Rule 95, which is very similar to the Westmoreland County rule; New Mexico, Minnesota, Oklahoma (northern, eastern and western districts); Wisconsin, which is substantially similar to the District of Columbia; Kansas; and North Dakota."

No further citation of authority is required to demonstrate that a court has the power to adopt reasonable regulations for the conduct of its own business and for the promotion of the orderly and expeditious administration of justice. Such rules become unreasonable only when they interfere with the constitutional rights and privileges of others. As has been pointed out in the opinion of the Court of Common Pleas of Westmoreland County and in the opinion of the Supreme Court of Pennsylvania, the rights of newspapers and their employees rise no higher than those of the citizens. "The fact that petitioners are in the business of disseminating news gives them no special right or privilege, not possessed by other members of the public." (Appendix page 8).

Counsel for respondents respectfully submit that the writ of certiorari should not be granted because the decision of the Supreme Court of Pennsylvania was restricted to the special issues presented in this case, and did not purport to determine whether or not the taking of photographs by news photographers constitutes an element of freedom of the press as protected by the Fourteenth Amendment. Neither does it make any new determination that freedom of the press is subject to reasonable regulations, for this determination already has been made in many instances by the Su-

preme Court of the United States. Mr. Justice Bell, in his opinion, cited many cases decided by this court in which it has been held uniformly that "Neither freedom of speech nor freedom of the press, nor freedom of religion . . . is absolute and unlimited." (Appendix page 11).

Counsel for respondents respectfully request your honorable Court to deny the writ of certiorari.

Respectfully submitted,

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